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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 365.

MICHAEL C. SANSONE,
Petitioner,

vs.

UNITED STATES.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR THE PETITIONER.

ARGUMENT.

I. While Section 7201 may be the only statute defining punishment for a defendant who has been found by a jury to be guilty of tax evasion, this does not preclude the possibility that lesser offenses under the Internal Revenue Code might be involved in a tax evasion charge, so that under appropriate evidence and Rule 31 (c) a jury should be given the alternative of finding defendant guilty of a lesser offense not amounting to a tax evasion.

Much of the government's brief, and indeed all of Point I of its argument, is devoted to the proposition that Section 7201 is the only statute dealing with income tax eva-

sion, and is the only statute under which such a crime may be punished. Petitioner has no quarrel with this, insofar as it refers to an offense which the jury has found to constitute tax evasion (i. e., a willful attempt to defeat or evade taxes) and where the jury has by its verdict rejected any lesser included tax offense. But somehow or other, the government rationalizes that this precludes any lesser offense instructions in an income tax evasion trial, and that (for some undisclosed reason) Section 7201 should be immune from the provisions of Rule 31 (c):

> "To repeat, however, if the charge and proof, if true, necessarily show a felonious evasion of tax under Section 7201, that section alone defines the offense and the penalties."
>
> (Brief for the United States, p. 19.)

The government overlooks the fact that even though the charge and proof may show a *prima facie* tax evasion offense, the jury might disbelieve some of that proof and might not be convinced beyond a reasonable doubt as to some required element of the tax evasion offense; in such instance, the jury should be able to find defendant guilty, under Rule 31 (c), of one of the lesser crimes (not requiring the questioned element), included in the tax evasion charge—crimes which violate the Internal Revenue Code but do not amount to tax evasion. Thus even though the government may indict for tax evasion, and may make *prima facie* proof of tax evasion, where there is conflicting evidence as to certain elements the jury should not be limited to the two possibilities of either convicting of tax evasion or acquitting. The fact that there is but one tax evasion statute is immaterial; what is important is that the Code defines other offenses, necessarily included in the tax evasion charge, under which the jury might convict if it found an absence of some element essential to a tax evasion conviction. This is precisely the situation which Rule 31 (c) was intended to cover, and no reason whatso-

ever has been suggested or demonstrated by the government as to why this rule should not be pertinent in an income tax evasion case. Offenses under the Internal Revenue Code certainly are no different from other federal crimes insofar as the applicability of the Federal Rules of Criminal Procedure is concerned.

In short, petitioner is not contending that the jury should have had the option of convicting under a misdemeanor statute for the felony of tax evasion. Petitioner simply submits that lesser offenses, not amounting to tax evasion, are included in the instant charge, and that under the evidence the jury might have concluded that one of these lesser offenses, rather than the tax evasion felony, was committed. Therefore, instructions as to the lesser offenses were required.

II. The specific intent required under Section 7201 is different and greater than that required for misdemeanors under Sections 7203 and 7207; since the evidence here showed conflicts as to the nature and degree of defendant's intent, adequate justification existed for lesser offense instructions.

In arguing that the evidence did not justify any lesser offense instructions, the government contends that "the existence of a tax deficiency" is the aggravating element distinguishing a 7201 felony from a 7207 misdemeanor (Brief for the United States, p. 20). Similarly, it argues that an affirmative act, as distinguished from a mere omission, is the aggravating element distinguishing the felony from a 7203 misdemeanor. On the other hand, the government submits, the element of "willfulness" is required in all three crimes and hence is not an aggravating or distinguishing element; in other words, if the jury found "willfulness", it should convict of the felony; but if it found no "willfulness," it must acquit altogether (Brief for the United States, p. 22). This argument erroneously

assumes that the element of "willfulness" means the same thing in each of the three offenses, an assumption which has been specifically rejected by this Court and by the language of the statutes themselves.

In **Spies v. United States**, 317 U. S. 492, 497, it was clearly recognized that the term "willful" can mean many different things, depending upon the context in which it is used. Thus, it was illustrated, it might mean merely "voluntary and purposeful" as distinguished from accidental, when used in the misdemeanor statutes. But as used in the felony statute, Section 145 (b) (now Section 7201), the **Spies** opinion points out that the willfulness must pertain to a **tax evasion attempt**; this was further enunciated in **Holland v. United States**, 348 U. S. 121, 139, where it was noted that willfulness as used in the felony statute involves a "specific intent," i. e., an intent to commit the crime charged. The language of the code admits of no other construction; all three sections use the term "willfully," yet in each section that term refers to a different act. In Section 7201, it pertains to the attempt to defeat or evade taxes; in Section 7203, it refers to the failure to pay a tax or file a return; and in Section 7207 it clearly refers to the delivery of a return known to be false. Thus only in regard to Section 7201 does the "willfulness" element involve an intent to defeat or evade taxes; in the misdemeanor statutes it means something less, perhaps, as suggested in **Spies**, merely that the act or omission was intentional and voluntary.

Therefore, the element of willfulness or intent is a distinguishing feature between the felony and the misdemeanor. Only when such willfulness involves an intent to defeat or evade taxes can the felony be found; if the taxpayer's intent is anything less than that, he can be convicted only of a misdemeanor.

The evidence below clearly demonstrates a conflict on the issue of intent, best illustrated by the very written

admission which the government used to prove intent (R. 77). One sentence in that admission expressly repudiates any intent to evade:

> "It was not my intention to evade the payment of our proper taxes and I intended to pay any additional taxes due when I was financially able to do so."

The Solicitor argues that, since petitioner's own trial testimony repudiated the entire admission, he cannot rely on that admission as justifying a lesser offense instruction (Brief for the United States, p. 22). The appellate decisions cited by the Solicitor do not support this contention; they merely hold that where there is no contested issue as to the distinguishing element (that element which raises a misdemeanor to a felony), a lesser offense instruction as to the misdemeanor is not authorized. But none of these cases prohibits the use of government evidence, which a defendant has repudiated, as grounds for the lesser instruction. In fact, one of these decisions, **Cuillo v. United States**, 325 F. 2d 227, 228, specifically rejects the argument now advanced by the Solicitor:

> "The Government in its brief appears to accept the principle that, in order to obviate the need for the requested (lesser offense) instruction, the defense testimony must 'affirmatively' establish the distinguishing elements, i. e., obtaining and reliance. We take 'affirmatively' in this context to mean that the evidence in question admits of no rational inferences other than those establishing the existence of the two elements involved. To apply a lesser standard would be to trench upon the jury's function, and to deprive appellant of his right to have the jury reach its own conclusions from evidence which is susceptible of varying interpretation."

Here the written admission of petitioner, introduced into evidence and read to the jury (R. 75), even though re-

pudiated by petitioner, injected a clear question as to the element of willfulness, particularly as to whether it included an intent by petitioner to defeat and evade his taxes. If the jury were to believe the admission in its entirety, it must necessarily conclude that Sansone intentionally understated his 1957 income so that he would not pay the tax immediately, but did not intend to evade the tax and fully intended "to pay any additional taxes due" when he was "financially able to do so." This would be a 7203 violation and nothing more, absent the critical element of tax-evasion intent.

Even without the written admission, the evidence requires at the very least an instruction under Section 7207. (Apparently the Government has abandoned the argument, advanced by the Eighth Circuit, that this section does not apply to income tax returns.) Petitioner, in his trial testimony, admitted receiving the proceeds from the 1957 sale (R. 135), and admitted that he intentionally did not report that sale in his 1957 return (R. 135). His justification was that he anticipated further costs on the land, which he thought he was entitled to recover before reporting any capital gain (R. 135). Under this testimony, a jury could reasonably conclude that even if he honestly anticipated further costs and their determination as necessary before reporting any gain or profit, he should have reported the fact of the sale on his 1957 return because the return calls for the reporting of all sales and exchanges during the taxable year, thus he was guilty of willfully (i. e., intentionally and not accidentally) filing a return which he knew to be false. This would be on the theory that even an honestly held belief that no gain is yet reportable on a particular transaction does not relieve a taxpayer from giving his government the information called for as to the fact of a transaction. A taxpayer, for instance, may not willfully omit from his return the fact of a condemnation or sale of his personal residence, even though by proper election he could avoid

reporting gain thereon until some future year. On the other hand, a jury could just as reasonably choose to disbelieve that he honestly held any belief that his anticipated costs should have been ascertained before he was obliged to show any capital gain and find him guilty of an intent to defeat and evade his 1957 taxes. Hence a genuine factual issue, revolving around taxpayer's intent, is raised by his testimony: did it show a taxpayer merely intentionally and not accidentally filing a 1957 return which he knew to be false as to content and information, yet fail to convince beyond a reasonable doubt that his willful misconduct did not stop there, but went on to encompass an intent to defeat or evade the tax? Such an issue required a lesser offense instruction under Section 7207. Furthermore since this instruction is justified by the trial testimony alone, it does not depend upon the acceptance or rejection of all or part of the written admission. Thus petitioner submitted two separate lesser offense instructions to the trial court: one, defining the misdemeanor under Section 7203, was justified by the statements in the written admission of the taxpayer; the second, defining a Section 7207 misdemeanor, was fully supported by his trial testimony and was required irrespective of the written admission, although the admission (even if taken alone), also independently delineated a Section 7207 offense.

The government takes the position that the fact, even if believed, that petitioner intended to correct his 1957 return at some future time and intended to report his 1957 income in some future year would not entitle him to a lesser offense instruction under Section 7203; the thrust of this argument is that as soon as he dropped his false 1957 return in the mail, he then and there completed the crime of attempting to evade or defeat the assessment of his 1957 income tax. The fallacy of this argument is that it assumes that a willful attempt to postpone or delay the assessment of one's 1957 income tax is the same as an attempt to defeat or evade the assessment of one's 1957

income tax; in short, it equates the statutory language "to evade or defeat" with "to postpone or delay." **Evade** and **defeat** mean to deprive and cheat on a permanent basis; these words imply a far different meaning than merely to delay in point of time the performing of some obligation. In both cases, criminality applies, but the jury would determine whether the taxpayer's attempt was merely to postpone (willful non-payment, a misdemeanor) or to permanently deprive the government of its revenue (a felony), whether it be by way of defeating assessment or defeating payment. This distinction has been recognized by this Court under analogous circumstances in **Keegan v. United States**, 325 U. S. 478, where counselling the refusal to serve in the armed forces of the United States until some future time was not held to be counselling an "evasion" of one's military obligation. The weakness of the government's position is that not every false return need be filed with the intent to defeat or evade the assessment, the tax, or the payment involved; it may be filed with the unlawful intention (though the lesser offense of a misdemeanor) to make an unauthorized borrowing of the government's tax monies and later to self-assess correctly and to make payment in full. Whether or not such a professed intent is credible under any record is a jury question. Furthermore, the government, it seems, has recognized such a distinction in bringing past indictments. In **United States v. Seymour** (D. Mass. April 11, 1955, unreported), the taxpayer correctly stated in his return all income and expense items, but willfully overstated the payments and credits on his declaration of estimated tax. His intent was to defer payment of the tax until pressed. Under the government's theory, he would have been guilty of an attempt to defeat and evade his tax when he mailed the return because his return was patently false and the amount shown as due was willfully rendered incorrect. Yet he was charged and convicted only a willful failure to pay his tax under Section 7203. The cases cited by the govern-

ment for the proposition that the crime of tax evasion is complete as soon as the false and fraudulent return is filed (Brief for the United States, p. 24) all carry the additional *caveat* "with intent to defeat or evade any part of the tax due the United States," see **Cave v. United States**, 159 F. 2d 464, 467, cited at p. 24 of Brief for the United States. Petitioner suggests that it is more accurate to say that **some** crime is complete as soon as the false and fraudulent return is filed, but whether it is the felony of tax evasion or some lesser offense depends on whether the intent was to defeat and evade or merely to postpone and delay, as finally determined by the jury.

Petitioner suggests that the gradation between offenses set forth here on the basis of the accused's intent is typical of the gradation found in lesser included offenses in other areas of the criminal law. If anything, the teaching of **Spies**, supra, is that tax crimes are not *sui generis* and are not to be divorced from settled doctrines of criminal jurisprudence. In larceny, for instance, once given the element of asportation, the question for the jury is whether the defendant intended to deprive the true owner permanently thereof or to return it to him. This is perfectly illustrated in those cases where the defense to the felony of larceny of a motor vehicle is that the defendant was only out for a joy-ride, an unauthorized borrowing, and intended to return the auto to its true owner, thus making the offense the misdemeanor of unauthorized possession of a motor vehicle. There are numerous other instances where the jury's fact-finding as to a defendant's intent makes him guilty either of the greater or lesser offense. The basis for gradation here is not new and depends just as much on the jury's common sense appraisal of the evidence before it as the difference in intent between murder and manslaughter, assault with intent to kill and common assault, larceny of a motor vehicle and unauthorized possession of a motor vehicle (to name a few).

CONCLUSION.

It is submitted that record below clearly justifies the requested lesser offense instructions, and that the government's attempt to exempt Section 7201 from the application of Rule 31 (c) is without authority or justification in logic, precedent, or legislative history.

Respectfully submitted,

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